INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	4
Argument	6
Conclusion	10

CITATIONS

Cases:

Alabama ex rel. Gallion v. *Rogers*, 187 F. Supp. 848 — 9

Coleman v. *Kennedy*, 313 F. 2d 867 (C.A. 5), certiorari denied, 373 U.S. 950 — 7, 10

Dinkens v. *Attorney General*, 285 F. 2d 430, certiorari denied, 366 U.S. 913 — 7, 9

Hannah v. *Larche*, 363 U.S. 420 — 8, 9

Kennedy v. *Bruce*, 298 F. 2d 860 — 7

Kennedy v. *Clayton*, No. 19732, C.A. 5 — 5

Kennedy v. *Lynd*, 306 F. 2d 222, certiorari denied, 371 U.S. 952 — 7, 9, 10

United States v. *Lynd*, 301 F. 2d 818, certiorari denied, 371 U.S. 893 — 7

United States v. *White*, 322 U.S. 694 — 9

Wilson v. *United States*, 221 U.S. 361 — 9

Constitution and Statutes:

U.S. Constitution:

Article III, Section 2 — 2, 9

Fifth Amendment — 2, 8

Sixth Amendment — 2, 8

42 U.S.C., Supp. IV, 1974 — 2

42 U.S.C., Supp. IV, 1974b — 2, 3, 4, 6, 7

42 U.S.C., Supp. IV, 1974d — 2, 3, 4, 6

Miscellaneous:

106 Cong. Rec. 7767 — 7

728-672—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 938

MRS. WALTER LEWIS, CIRCUIT CLERK AND REGISTRAR OF ELECTIONS OF BOLIVAR COUNTY, MISSISSIPPI, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 325 F. 2d 210. The opinion of the district court (R. 181–182) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1963 (R. 203), and a petition for rehearing was denied on January 28, 1964 (R. 259). The petition for a writ of certiorari was filed on March 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner is entitled to know and to have an opportunity to controvert the factual information upon which the Attorney General premised the statement of the basis and purpose for his demand under 42 U.S.C. 1974b and 1974d for the voting records in her custody.

2. Whether, assuming that 42 U.S.C. 1974b and 1974d do not require the Attorney General to divulge upon what information he premised his statement of the basis and purpose for the demand, the statute violates petitioner's rights under the Fifth and Sixth Amendments.

3. Whether, if the district court could not inquire into the substantiality of the Attorney General's statement of the basis and purpose for his demand, the district court's order granting the demand was unconstitutional on the ground that this matter was then no longer a case or controversy under Article III, Section 2.

STATUTE INVOLVED

Section 1974 of Title 42 U.S C., Supp. IV, provides:

> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act

requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Section 1974b of Title 42 U.S.C., Supp. IV, provides:

Any record or paper required by section 1974 of this title to be retained and preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying at the principal office of such custodian by the Attorney General or his representative. This demand shall contain a statement of the basis and the purpose therefor.

Section 1974d of Title 42 U.S.C., Supp. IV, provides:

The United States district court for the district in which a demand is made pursuant to section 1974b of this title, or in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.

STATEMENT

On August 11, 1960, the Attorney General of the United States, requested, pursuant to Section 303 of Title III of the Civil Rights Act of 1960 (74 Stat. 88, 42 U.S.C. 1974b), that petitioner, as the Circuit Clerk and Registrar of Elections of Bolivar County, Mississippi, make available for inspection and copying various records and papers pertaining to registration and voting (R. 4–6). On September 15, 1960, petitioner declined to turn over the records (R. 8–10). On January 11, 1961, the Attorney General, pursuant to Section 305 of the Act (74 Stat. 88, 42 U.S.C. 1974d), applied to the District Court for the Northern District of Mississippi for an order requiring petitioner to permit inspection of the voting records of Bolivar County (R. 1–4).

On July 26, 1961, petitioner submitted numerous motions. One motion requested a more definite and certain statement, and several motions attacked the constitutionality of Title III of the Civil Rights Act of 1960 (R. 55–56). On November 28, 1961, the court granted in part petitioner's motion for a more definite statement. The court required the respondent to furnish within thirty days full details on the distinctions in voting on account of race or color upon which the respondent based his demand for voting records in Bolivar County (R. 107–108).

On December 26, 1961, the respondent filed his response which declined to furnish a more definite statement. On February 15, 1962, no further action having been taken by the district court on the matter, the respondent filed a motion for reconsideration of

the court's order for a more definite statement (R. 113). In this motion, respondent set forth the delays in the case in support of his request for prompt issuance of an order for the production of the records (R. 114–119). No action was taken by the court to set a hearing on the motion until the respondent petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus to compel the district court to act. *Kennedy* v. *Clayton*, No. 19732 (R. 129–130). Upon the district court's agreement to hear the matter, the respondent moved the court of appeals to defer argument and action on the mandamus (R. 129).

At the conclusion of the hearing on July 19, 1962, the district court set aside its order of November 28, 1961 (R. 140). On July 30, 1962, petitioner filed her answer in which she admitted that the Attorney General had made a demand (as described in his application) upon her for the voting records under her control and that she had refused to comply therewith (R. 141–145). She also reasserted her motions regarding the constitutionality of Title III of the Civil Rights Act of 1960 and moved to dismiss for failure to state a claim (R. 145–146). On November 16, 1962, the district court overruled all of petitioner's motions and granted the demand of the respondent, limited, however, to records and papers which related to the eligibility of any listed voter eligible to vote in the primary election of June 7, 1960, and the general election of November 8, 1960 (R. 182).

The respondent appealed (R. 182), and petitioner cross-appealed (R. 186). On December 6, 1963,

the court of appeals affirmed the judgment of the district court insofar as it was challenged by petitioner and ordered it modified to remove the limitations objected to by respondent. On January 28, 1964, the court of appeals denied a petition by petitioner for rehearing (R. 259).

ARGUMENT

This case was brought by the Attorney General under Title III of the Civil Rights Act of 1960 which was designed to give the Attorney General ready access to state voting records in order to prevent denial of the right to vote based on race. Consequently, the Act provides for summary enforcement procedures if state and local officials refuse to produce such records. Nevertheless, as the result of repeated delays by the district court (those described above and numerous others), the Attorney General's demand for records was not enforced (and then only in part) by the district court for over two years. The Court of Appeals for the Fifth Circuit affirmed the enforcement order and removed the limitations. This decision was correct and was consistent with earlier decisions of the Fifth Circuit, some of which this Court has declined to review. Similarly, in this case, there is no need for further review of the decision below.

1. Petitioner contends (Pet. 29) that, in a proceeding brought by the Attorney General under 42 U.S.C. 1974b, d, he is entitled to known and have the opportunity to controvert the factual information upon which the Attorney General premised the demand for voting records. This contention is patently erroneous.

The demand letter sent to the petitioner by the Attorney General stated (R. 4, 5):

> This demand is based upon information in the possession of the Attorney General tending to show that distinctions on the basis of race or color have been made with respect to registration and voting within your jurisdiction.
>
> The purpose of this demand is to examine the aforesaid records in order to ascertain whether or not violations of federal law in regard to registration and to voting have occurred.

Considering the summary nature of enforcement proceedings under Title III of the Civil Rights Act of 1960, these allegations were plainly sufficient. They state, in general terms, the basis and purpose of the Attorney General's demand. Section 1974b of the Act states that this is all that is necessary. Senator Keating, a principal spokesman for the Act, explicitly said on the floor of Congress that such a statement is sufficient. 106 Cong. Rec. 7767. And letters worded identically to this one have been held to be sufficient in *Kennedy* v. *Bruce*, 298 F. 2d 860, 863 (C.A. 5), *United States* v. *Lynd*, 301 F. 2d 818, 822 (C.A. 5), certiorari denied, 371 U.S. 893, *Kennedy* v. *Lynd*, 306 F. 2d 222, 226 (C.A. 5), certiorari denied, 371 U.S. 952, *Alabama ex rel. Gallion* v. *Rogers*, 187 F. Supp. 848, 854 (M.D. Ala.), affirmed *sub nom*, *Dinkens* v. *Attorney General*, 285 F. 2d 430 (C.A. 5), certiorari denied, 366 U.S. 913, and *Coleman* v. *Kennedy*, 313 F. 2d 867 (C.A. 5), certiorari denied, 373 U.S. 950.

2. Petitioner also claims (Pet. 34, 51) that if the courts below correctly interpreted 42 U.S.C. 1974b, d, as not requiring the Attorney General to divulge the

reasons and facts behind his statement of the basis and purpose for the demand, then the Act violates petitioner's rights under the Fifth and Sixth Amendments. Petitioner suggests that she has a right to confrontation and cross-examination of the persons who furnished the information in the Attorney General's possession constituting the basis of his inspection demand.

This contention is without merit for three reasons. First, the materials ordered to be produced are records pertaining to federal elections. Therefore, the State's right *vis-à-vis* the federal government is limited. Surely, the United States has the bare right to inspect and copy these official records pursuant to statutory authorization without a full trial of the need for the records.

Second, this Court rejected a similar contention in *Hannah* v. *Larche,* 363 U.S. 420. In that case, the Civil Rights Commission was attempting to compel the testimony of witnesses, whereas here the Attorney General sought only the inspection and copying of records. Yet the Court there held that the due process clause does not require that in an investigation, as opposed to an adjudicatory proceeding, persons under investigation be informed of the identity of the complainants or be given the right to cross-examine them. *Id.* at 440–453. And the Court further observed that the Sixth Amendment "is specifically limited to 'criminal prosecutions' * * *." *Id.* at 440, note 16. Similarly here, the inspection and copying of records by the Attorney General is part of an investigation, not a criminal prosecution or ad-

judication. Indeed, the Attorney General has no power to adjudicate; he may merely initiate a law suit. See *Kennedy* v. *Lynd, supra,* 306 F. 2d at 225, 228; *Alabama ex rel. Gallion* v. *Rogers, supra,* 187 F. Supp. at 854.

Third, the records subject to the demand are not the registrar's—they are the State's. Accordingly, the registrars may not object to the surrender of these records on grounds which relate only to themselves. See *Wilson* v. *United States,* 221 U.S. 361, 380; *United States* v. *White,* 322 U.S. 694. While, as representatives of the State they may raise any objections which the State may have, the State is not endangered by loss of reputation or criminal prosecution. In his dissenting opinion in *Hannah* v. *Larche, supra,* 363 U.S. at 493, 496, Mr. Justice Douglas said that a person is entitled to cross-examination of witnesses giving information which is the basis of an investigation of himself before being required to testify since the investigation could lead to a criminal prosecution. Even if this view had been accepted, the registrars here have no right at this stage to cross-examine the persons who supplied information to the Attorney General because they could claim only the rights of the State and the State was not subject to prosecution.

3. Petitioners contend (Pet. 37–41) that, if the district court may not inquire into the background of the Attorney General's statement of the basis and purpose for his demand, then this is no longer a "case or controversy" under Article III, Section 2, and that therefore there is no jurisdiction in the federal courts

to issue an order such as the Attorney General requests. This claim, too, is clearly without merit. As the court of appeals held in *Kennedy* v. *Lynd, supra,* 306 F. 2d at 225:

> There are adversaries—the Attorney General seeking an order against the objecting State official as custodian. § 1974b. The dispute is real and present as the application seeks "appropriate process," § 1974d, in order "to compel the production" of records or papers demanded by the Attorney General in writing. § 1974b. That by its terms and operation, Title III narrowly circumscribes the issues upon which the Court is to act does not make the proceeding or that determination any less judicial.

See also *Coleman* v. *Kennedy, supra,* 313 F. 2d 867.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

HAROLD H. GREENE,
GERALD P. CHOPPIN,
Attorneys.

APRIL 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964